RE LIOW FONG MOOI, EX P MALAYAN BANKING BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[BANKRUPTCY NO: 29-791-96]
27 JANUARY 2000

BANKRUPTCY: *Creditor's petition - Verifying affidavit - Defective jurat - Whether fatal to petition - Whether an irregularity that was curable - Bankruptcy Act 1967, s. 131*

BANKRUPTCY: *Petition - Presentation of petition - More than six months after date of act of bankruptcy - Application to set aside bankruptcy notice - Whether act of bankruptcy deemed committed until application heard and determined - Withdrawal of application by judgment debtor - Whether act of bankruptcy deemed committed then - Whether petition could be amended to correctly state date of act of bankruptcy - Whether amendment would affect substance of petition - Whether occasioned any substantial injustice - Bankruptcy Rules 1969, r. 95(1), (2)*

BANKRUPTCY: *Petition - Amendment - Date of act of bankruptcy incorrectly stated - Whether to be amended by judge in chambers - Whether amendment ought to be made by SAR instead*

On 19 November 1996, the judgment creditor ('the JC') served a bankruptcy notice on the judgment debtor ('the JD') and the due date for compliance fell on 26 November 1996. The judgment debtor ('JD') applied to set aside the bankruptcy notice and this was to be heard on 19 August 1997. But on that date the JD withdrew the matter. On 11 December 1997, the JC served a bankruptcy petition on the JD, stating that the JD had committed an act of bankruptcy on 27 November 1996.

The JD then filed a notice of intention to oppose the petition and a summon-in-chambers to set aside the said petition. The JD argued: (i) that the affidavit verifying the petition contained a defective jurat; (ii) that the bankruptcy petition was presented more than six months after the date of the act of the bankruptcy contrary to s. 5(1)(c) of the Bankruptcy Act 1967 ('the Act'); and (iii) that there was an error in stating the date of the act of bankruptcy. The Senior Assistant Registrar ('the SAR') dismissed the application. Hence, this appeal by the JD against the said decision of the SAR.

Held:

[1] There was no question or doubt as to the deponent's identity. The fact that the jurat omitted to mention his name did not detract from the fact that he did swear the affidavit before a commissioner of oaths. The said omission was a defect which only went to the form and not to the substance of the affidavit. Section 131 of the Bankruptcy Act 1967 ('the Act') provides that such a formal defect does not invalidate the proceedings. The defect had not occasioned any substantial injustice.

[2] Section 5(1)(c) of the Act states that the act of bankruptcy relied upon to found a petition, must have occurred within six months before the presentation of the bankruptcy petition. When the bankruptcy notice was served on the JD on 19 November 1996, she filed an affidavit opposing the same within 7 days thereof. Once the affidavit was filed, by virtue of r. 95(1) of the Bankruptcy Rules 1969, the said affidavit operated as an application to set aside the bankruptcy notice and by virtue of r. 95(2), no act of bankruptcy would be committed under the notice until the application was heard and determined. Further, the parties had agreed that the time for compliance with the bankruptcy notice was deemed to have been extended until the application was heard and determined.

[3] The mistake in the date of the act of bankruptcy was an irregularity which did not go to the substance of the complaint in the petition. The error in question did not in any way detract from the fact that the JD had failed to comply with the bankruptcy notice within the time allowed by law. The irregularity would come within the contemplation of s. 131 of the Act. Additionally, no substantial injustice would be caused to the JD.

[4] The proposed amendment did not seek to introduce a new act of bankruptcy into this petition. The act of bankruptcy relied upon remained the same. The amendment to be made was to correctly state the date on which that event happened and to that extent must be regarded as a technical one which did not go to the substance of the petition. Therefore, the JC should not be prevented from amending the bankruptcy petition.

[5] The amendment was to be made by the SAR as the issue had remained outstanding before her when the hearing had been adjourned on its merits.

[Appeal dismissed with costs. Date of bankruptcy to be amended to 19 August 1997 by SAR.]

Case(s) referred to:
Re a Debtor (No 31 of 1969), ex p the Debtor v. Triggs Turner & Co [1970] 1 All ER 920 ***(refd)***
Re Dunhill, ex-parte Dunhill [1894] 2 QBD 234 ***(refd)***
Re Fadzil bin Othman, ex p Malayan Banking Bhd [1994] 2 MLJ 474 ***(not foll)***
Re Lorrimar, ex p Constable [1890] 62 LT 943 ***(refd)***
Re Natarajan Kuppusamy, ex p Co-operative Central Bank Ltd (In receivership) [1992] 3 CLJ 1638 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1)(c), 93(3), 131
Bankruptcy Rules 1969, r. 95(1), (2)

Bankruptcy Act 1914 [UK], s. 109(3)

Other source(s) referred to:
McDonald, Henry & Meek Australian Bankruptcy Law & Practice, pp. 880, 881
Williams' Law and Practice in Bankruptcy, 18th edn, pp. 551, 553

For the judgment debtor - Athithan Singaravelu; M/s Thevin, Chandran & Wong
For the judgment creditor - James Devadason; M/s Maxwell Kenion Cowdy & Jones

Reported by Bhawani Mano

JUDGMENT

Clement Skinner JC:

This is an appeal against the decision of the Senior Assistant Registrar (SAR), dismissing the judgment debtor's application to set aside a bankruptcy petition against her.

On 19 November 1996, the judgment creditor served a bankruptcy notice on the judgment debtor. The last day to comply with that bankruptcy notice fell on 26 November 1996. For reasons explained later, slightly more than a year after the bankruptcy notice was served, the judgment creditor on 11 December 1997 presented a bankruptcy petition against the judgment debtor. In the petition, the judgment creditor stated that the act of bankruptcy relied upon to found the petition was committed on 27 November 1996.

On being served the bankruptcy petition, the judgment debtor filed a notice of intention to oppose the petition and also filed a summons-in-chambers applying to set aside the bankruptcy petition. The SAR heard the application on 17 June 1999 and dismissed it. Hence this appeal.

Before me, Mr. Athithan learned counsel for the judgment debtor took two points only.

It was firstly argued that the affidavit verifying the petition contained a defective jurat by reason whereof it should not be read, and if the affidavit was not read, the petition stood unverified and must be set aside.

The affidavit verifying the petition was sworn to by an officer of the judgment creditor, and begins by describing the deponent as Yong Teck Chong, the holder of identity card H0614356. Counsel for the judgment debtor however complains that when the deponent signed the affidavit before the attesting commissioner of oaths, the jurat to the affidavit did not carry or state the name of the deponent. This is how that jurat reads:

> Sworn by the said ... at Kota Kinabalu

According to counsel, the omission to state the name of the deponent in the jurat would mean that the commissioner of oaths had not identified the person who swore the affidavit, and it matters not that the name of the deponent is already stated at the beginning of the affidavit because, according to counsel, that part of the affidavit is not being attested to by the commissioner of oaths and so there cannot be a presumption that Yong Teck Chong signed the affidavit.

I regret I find no merit in this objection. There can be no question or doubt as to the identity of the deponent to the affidavit. Anyone reading the affidavit will see that it begins by describing the deponent as Yong Teck Chong and his signature appears on the affidavit. The fact that the jurat omits to mention his name does not detract from the fact that he did swear the affidavit before a commissioner of oaths. There is accordingly no need to presume anything because a court reading an affidavit will not confine itself to only a part of the document but must necessarily look at the whole document and when that is done in the present case, it will be seen that apart from a description of the deponent in the jurat, the identity of the deponent is readily ascertainable from other parts of the same affidavit. At best the omission to state the name of the deponent in the jurat is a defect which goes to form only and not one that goes to the substance of the affidavit. Pursuant to the provisions of (s. 131 of the Bankruptcy Act 1967 (the Act) such formal defect would not invalidate these proceedings and I cannot see what substantial injustice has been occasioned to the judgment debtor by such omission and neither has counsel identified any.

It was next argued that this bankruptcy petition was presented more than six months after the date of the act of bankruptcy relied upon. Section 5(1)(c) of the Act states that the act of bankruptcy relied upon to found a petition must

have occurred within six months before the presentation of the bankruptcy petition. However, counsel for the judgment debtor points out that this bankruptcy petition was presented on 11 December 1997 whereas para. 4 of the petition states that the act of bankruptcy occurred on 27 November 1996. According to counsel, this petition being presented outside the six months period prescribed in the Act, must be set aside.

There is a reason why the bankruptcy petition was presented some one year after the alleged act of bankruptcy and there is no dispute between the parties on the facts about to be narrated. When the bankruptcy notice was served on the judgment debtor on 19 November 1996, she did within seven days thereof file an affidavit opposing the same and gave various reasons for so doing in the affidavit. Once such affidavit is filed, r. 95(1) of the Bankruptcy Rules 1969 (the Rules) provides that it shall operate as an application to set aside the bankruptcy notice and r. 95(2) goes on to provide that:

> If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of Bankruptcy shall be deemed to have been committed under the Notice until the application has been heard and determined.

The application to set aside the bankruptcy notice was not heard within the seven days for compliance specified in the bankruptcy notice, and the Registrar did not extend the time for compliance as required by r. 95(2) but the parties are agreed that on the authority of *Re Natarajan Kuppusamy, ex-p Co-operative Central Bank Ltd (In receivership)* [1992] 2 MLJ 468, the time for compliance with the bankruptcy notice was deemed to have been extended until the application had been heard and determined. That is a proposition with which I agree.

The application to set aside the bankruptcy notice was not heard and determined until 19 August 1997 on which date it was withdrawn by the judgment debtor. Both counsels are agreed that on that date as the judgment debtor had not complied with the bankruptcy notice, she had committed an act of bankruptcy and that the bankruptcy petition should have stated that the act of bankruptcy relied upon to found the petition had occurred on 19 August 1997 and not 27 November 1996.

There had quite obviously been an error in stating in the bankruptcy petition the date upon which the act of bankruptcy occurred but it is the submission of counsel for the judgment debtor that the misstatement of the date of the act of bankruptcy is fatal and on the authority of *Re Fadzil bin Othman, ex p Malayan Banking Bhd* [1994] 2 MLJ 474, a case in which it was held that the error in incorrectly stating the date of the act of bankruptcy by even a single day was sufficient to set aside a bankruptcy petition, this petition should

be set aside. It is also counsel's submission that the mistake in stating the incorrect date of the act of bankruptcy cannot be cured or remedied by an amendment to the petition because a court will not allow a bankruptcy petition to be amended to rely on an act of bankruptcy in respect of which more than six months had elapsed between the date of its occurrence and the date the amendment is sought. In support counsel relied on the case of *Re a Debtor (No. 31 of 1969), ex p the Debtor v. Triggs Turner & Co* [1970] 1 All ER 920.

Mr. James Devadason, learned counsel for the judgment creditor submitted that the mistake in not correctly stating in the petition the date on which the act of bankruptcy occurred is an irregularity which by virtue of the saving provisions of s. 131 of the Act, will not invalidate these proceedings and thus urged the court to allow an amendment to be made to the petition to correctly state the date of the act of bankruptcy. If such an amendment is made, the bankruptcy petition suffers from no defect since it was presented well within six months of 19 August 1997.

To my mind, the real issues that arise for determination are, (a) whether the mistake in incorrectly stating the date on which the act of bankruptcy occurred amounts to an irregularity which can be cured so that the petition is saved by virtue of s. 131 of the Act; and (b) if the mistake is to be regarded as an irregularity, whether the petition may be amended to correctly state the date on which the act of bankruptcy occurred.

On the first issue, it is my finding that the mistake has an irregularity only which did not go to the substance of the complaint in this petition. The error in stating the date on which the act of bankruptcy took place did not in any way detract from the fact that the judgment debtor had failed to comply with the bankruptcy notice within the time allowed by law. Being an irregularity only, such mistake would in my view come within the contemplation of s. 131 of the Act. It is also my view that the irregularity had occasioned no substantial injustice to the judgment debtor. There is no dispute, doubt or confusion between the parties as to the date when the act of bankruptcy occurred, and why it occurred on 19 August 1997 and not 27 November 1996, as stated in the petition. The judgment debtor had also availed herself to the right to challenge the bankruptcy notice and in mounting this present challenge has not complained of any injustice or prejudice which she suffered as a result of the irregularity.

It follows from what I have stated above that I do not find the mistake to be fatal to this petition and respectfully decline to follow the decision in the case of *Re Fadzil bin Othman ex parte Malaysian Banking Berhad (supra)* relied

upon by counsel for the judgment debtor as that case did not consider the application of s. 131 of the Act.

Regarding the second issue on the question of amendment, s. 93 of the Act reads:

> The court may at any time amend any written process or proceedings upon such terms, if any, as it thinks fit to impose.

On the principles a court should have regard to when considering whether to amend a bankruptcy petition, counsel for the judgment debtor has referred me to *McDonald, Henry & Meek Australian Bankruptcy Law & Practice* and to pp. 880 and 881 thereof where examples of cases in which amendments have been allowed and disallowed are set out. Learned counsel for the judgment creditor has likewise referred me to *Williams' Law and Practice in Bankruptcy* 18th edn and to pp. 551 to 553 thereof. Without having to repeat what is stated in those publications, it would not be an unfair summary of one of the principles stated there and which is relevant to the determination of this appeal, if I said that a court would more readily allow an amendment which seeks to cure a defect or irregularity which is one of form or merely technical in nature but not if it is one of substance.

In support of his contention that the amendment sought in this case must be regarded as more technical than anything else, Counsel for the judgment creditor referred me to two cases in which the court had regarded an error made concerning the date of bankruptcy to be more technical in nature than one of substance and curable by amendment. In *Re Dunhill, ex parte Dunhill* [1894] 2 QBD 234, the bankruptcy petition simply stated that the debtor had failed to comply with a bankruptcy notice served upon him on a debtor named without stating the date of the act of bankruptcy. On appeal from the decision of the Registrar making a receiving order against the debtor, it was held by Vaughan Williams J that the bankruptcy petition ought to have stated the date but that the defect in not so stating the date of the act of bankruptcy was not a ground for setting aside the receiving order but ought to have been amended at the hearing of the petition, and since the registrar did not amend it, the appellate court did so.

In *Re Lorrimar, ex-p Constable* [1890] 62 LT 943 and reported on p. 35 of The Digest, Annotated British, Commonwealth and European Cases 4(2) 1991 2nd reissue, a bankruptcy petition was dismissed by the Registrar on the ground that the act of bankruptcy was not sufficiently alleged upon the face of the petition because what was alleged was the "non-compliance with a bankruptcy notice issued out of this court on 13 May 1890, and duly served upon (debtor) on the 13 day of the month." On appeal it was held that the objection was a purely technical one, which the Registrar ought to have dealt

with by amendment, and the petition must go back to the Registrar with a direction to amend and to hear the case on its merits.

The proposed amendment to this petition would involve changing the date on which the act of bankruptcy occurred from 27 November 1996 to 19 August 1997. Would such an amendment by one that goes to the substance of the petition? I have already found that the mistake in incorrectly stating the date on which the act of bankruptcy occurred in this petition was an irregularity which did not go to the substance of the petition and have given my reasons for saying so. It must follow from that finding that an amendment necessitated by such mistake will not be one that affects the substance of the petition, namely, that the judgment debtor has failed to comply with the bankruptcy notice within the time allowed in law.

The next question that arises for determination is whether an amendment can be made to the petition as more than six months have now passed since the date of the act of bankruptcy? Counsel for the judgment debtor referred to the case of *Re a Debtor (No. 31 off 1969), ex parte the Debtor v. Triggs Turner & Co. (supra)* as authority for the proposition that in such a situation you cannot do so. That was a case in which Wadhams (HNC) Ltd (W) as well as Trigge & Turner & Co. (Triggs) each served separate bankruptcy notices on the debtor. The time for complying with W's bankruptcy notice expired on 20 May 1969. The time for complying with Triggs's is bankruptcy notice expired at the end of the day on 8 July 1969. W presented a bankruptcy petition against the debtor on 8 July 1969 and the act of bankruptcy relied on was the debtor's failure to comply before 21 May 1969 with W's bankruptcy notice. An application to amend the petition was granted so that not only was Triggs substituted for W as the petitioning creditors but also substituting, as the act of bankruptcy alleged, failure to comply with Triggs's bankruptcy notice, in place of the failure to comply with W's notice. The petition as so amended was, however, invalid because the time for complying with the Triggs notice did not expire until the end of the day on 8 July 1969 by which time W's petition had already been presented. When the debtor's appeal against the order of substitution came up, Triggs applied for the petition to be further amended under s. 109(3) of the Bankruptcy Act 1914 which is the English equivalent of s. 93(3) of our Bankruptcy Act 1967) by restoring the act of bankruptcy originally relied on *ie*, the failure to comply with W's bankruptcy notice before 21 May 1969. At the date of the hearing of the application, more than three months had elapsed since the occurrence of that act of bankruptcy. On those facts, it was held that an amendment would not be allowed which would introduce an act of bankruptcy more than three months after its occurrence, whether the act had at some time previously appeared on the petition or not.

As I read it, that case is authority for the proposition what where a petition is sought to be amended in such a manner as to introduce an act of bankruptcy which had occurred more than three month before the date of amendment it would not be allowed, the rationale being that as the Bankruptcy Act itself does not contemplate that an act of bankruptcy shall be available as a basis for a petition more than three months after it has occurred, the policy behind the Act would operate to prevent an amendment which introduces "de novo" an act of bankruptcy which by the date of the amendment was no longer available to found a petition.

Applying what is stated there to the facts of our case, can it be said that by the proposed amendment the judgment creditor seeks to introduce a new act of bankruptcy to found this petition? If it does not then the question of whether the act of bankruptcy occurred more than six months before the date of amendment becomes irrelevant and the decision in Triggas & Turner will have no application. In my judgment, the proposed amendment does not seek to introduce a new act of bankruptcy into this petition; the act of bankruptcy relied upon remains the same *ie*, non-compliance with the bankruptcy notice served on 19 November 1996. What the judgment creditor seeks to do by the contemplated amendment is to correct the date on which the act of bankruptcy occurred from 27 November 1996 to 19 August 1997. Accordingly, the amendment is made merely to correctly state the date on which that event happened and to that extent must be regarded as a technical one which does not go to the substance of the petition. I accordingly hold that the judgment creditor would not be prevented from amending its bankruptcy petition. The next question is whether the amendment should be made by the SAP or here. After dismissing the judgment debtor's application to set aside the bankruptcy petition, the SAP adjourned the hearing of the bankruptcy petition on its merits; it therefore remains outstanding for hearing before her. In these circumstances any amendments should be made by the SAR.

For all the reasons given above, I dismiss this appeal with costs. I also direct that before the bankruptcy petition is heard, it be amended by the SAR to correctly state the date on which the act of bankruptcy occurred *ie*, 19 August 1997.